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In the Matter of the Disciplinary Proceedings	:	
- against -	:	FINAL
Police Officer Brian Alexander	:	ORDER
Tax Registry No. 905673	:	OF
Military and Extended Leave Desk	:	DISMISSAL

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Police Officer Brian Alexander, Tax Registry No. 905673, Shield No. 20573, Social Security No. [redacted], having been served with written notice, has been tried on written Charges and Specifications numbered 82184/06, as set forth on form P.D. 468-121, dated 8/21/06, and after a review of the entire record, has been found Guilty as Charged.

Now therefore, pursuant to the powers vested in me by Section 14-115 of the Administrative Code of the City of New York, I hereby DISMISS Police Officer Brian Alexander from the Police Service of the City of New York.

RAYMOND W. KELLY
POLICE COMMISSIONER

EFFECTIVE:

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In the Matter of the Charges and Specifications	:	Case No. 82184/06
- against -	:	
Police Officer Brian Alexander	:	
Tax Registry No. 905673	:	
Military and Extended Leave Desk	:	

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At: Police Headquarters
One Police Plaza
New York, New York 10038

Before: Honorable Claudia Daniels-DePeyster
Assistant Deputy Commissioner - Trials

A P P E A R A N C E:

For the Department: David Green, Esq.
Department Advocate's Office
One Police Plaza
New York, New York 10038

For the Respondent: Regina Felton, Esq.
Felton & Associates
1371 Fulton Street
Brooklyn, NY 11216

To:

HONORABLE RAYMOND W. KELLY
POLICE COMMISSIONER
ONE POLICE PLAZA
NEW YORK, NEW YORK 10038

The above-named member of the Department appeared before me on October 23, October 24, October 25, November 1, and November 13, 2007, and January 17 and January 23, 2008, charged with the following:

1. Said Police Officer Brian Alexander, assigned to School Safety Division – Uniform Task Force, on or about and between May 1, 2006 through August 1, 2006, did wrongfully ingest a controlled substance, to wit: cocaine, without police necessity or authority to do so.

P.G. 203-10, Page 1, Paragraph 5 – PROHIBITED CONDUCT

2. Said Police Officer Brian Alexander, assigned to School Safety Division – Uniform Task Force, on or about and between May 1, 2006 through August 1, 2006, did wrongfully possess a controlled substance, to wit: cocaine, without police necessity or authority to do so.

P.G. 203-10, Page 1, Paragraph 5 – PROHIBITED CONDUCT

3. Said Police Officer Brian Alexander, while assigned to School Safety Division – Uniform Task Force, on or about September 13, 2007, having been personally notified and directed to report to the Department Advocate's Office, 1 Police Plaza, New York County, at 0900 hours, wrongfully did fail and neglect with said lawful order and notification. (As amended)

P.G. 203-03, Page 1, Paragraph 2 – COMPLIANCE WITH ORDERS
P.G. 203-05, Page 1, Paragraph 1 – PERFORMANCE ON DUTY – GENERAL REGULATIONS

The Department was represented by David Green, Esq., Department Advocate's Office, and the Respondent was represented by Regina Felton, Esq.

The Respondent, through his counsel, entered a plea of Not Guilty to the subject charges. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

DECISION

The Respondent is found Guilty as charged.

Introduction

It is not in dispute that on August 1, 2006 the Respondent was notified to report to the Police Department Medical Division for a random Dole test. It is not in dispute that he submitted to the Dole test where three hair samples were collected from his arm because he had no head hair at the time of the collection. It is also not in dispute that following the hair collection, the Respondent was notified that two of his three hair samples that were sent for testing by the Department came back positive for cocaine. What ***is*** in dispute is whether the Respondent wrongfully ingested and possessed cocaine (Specification Nos. 1 and 2). To prove its charges, the Department called several witnesses including Dr. Thomas Cairns as an expert witness. The Respondent also called witnesses including Dr. Jesse Bidanset as an expert witness. The Department then recalled Dr. Thomas Cairns to respond to the testimony of Dr. Jesse Bidanset.

The Respondent was also charged in Specification No. 3 with failure to comply with a personal notification to appear at the Department Advocate's Office. With respect to this third specification, Department witnesses were called out of turn and the Respondent was also called out of turn as a witness by the Department solely on the issue of failing to appear.

Prior to the commencement of this trial, the Respondent filed a Motion to Dismiss this cause of action. The Respondent also filed a Motion to Disqualify Psychemedics from Testifying as an Expert. Both motions, as well as responses to the motions are addressed in the Findings and Analysis portion of this decision.

SUMMARY OF EVIDENCE PRESENTED

The Department's Case

The Department called Doctor Thomas Cairns, Police Officer Grace Francis, Lieutenant Brian Crowley, the Respondent Police Officer Brian Alexander, Police Officer Barry Morris, and Police Officer Markland Clarke as witnesses.

Doctor Thomas Cairns

Cairns is currently employed as the Scientific Director at Psychemedics Corporation (Psychemedics), a drug testing laboratory. He is responsible for preparing laboratory data packages, overseeing records, and monitoring quality assurance. He testified that although Psychemedics is a publicly traded corporation and has a contract with the Department, those factors do not shape his testimony in any way. Psychemedics is licensed by the federal government and several states, including New York, to practice forensic toxicology. Based on his qualifications, Cairns was deemed an expert witness in the area of forensic toxicology.[1]

Cairns explained that ingested cocaine enters the bloodstream, which feeds hair follicles. The cocaine thereby gets trapped inside the hair as it grows. Since hair grows at a predictable rate, hair acts as a timeline as to when the cocaine was ingested. While hair on the head grows at a rate of approximately half an inch per month, body hair sites

[1] Cairns testified that he holds a Bachelor of Science with Honors and a PhD in Bioanalytical Chemistry. In addition, he has received a post-doctorate degree, a Doctor of Science in Toxicology, from the University of Glasgow. He was previously employed as a professor at the University of California Los Angeles and as Director of the Food and Drug Administration's (FDA) National Center for Toxicological Research. While at the FDA, he received a gold medal for distinguished research. In 1987, he became a science adviser to Psychemedics, and in 1995 he joined the company as Vice President for Research and Development. He has written several dozen publications on hair testing and frequently presents his research to scientific organizations. Cairns has personally been involved in hair testing for approximately 20 years, and he holds a license to practice forensic toxicology in New York State.

tend to grow at different rates. A sample of arm hair, for example, represents a period of approximately seven to eight months.

Cairns testified that Radioimmunoassay (RIA) Mass Spectrometry (MS) are the two technologies by which hair samples are tested in forensic toxicology. According to Cairns, the FDA has deemed the technology used by Psychemedics to be safe, reliable, precise, and accurate.[2] He explained that when Psychemedics receives hair samples, eight milligrams of hair are dissolved by enzymatic digestion and then analyzed by RIA using a prescribed positive cocaine cutoff level of five nanograms of cocaine per ten milligrams of hair (5ng/10mg). If the initial sample is deemed to be at or above the cutoff level, a second sample is then washed and analyzed by MS. Cairns explained that the form of MS used for analysis is the state-of-the-art technology Liquid Chromatography Mass Spectrometry Mass Spectrometry (LCMSMS). Cairns explained that while cocaine can be transmitted by secondhand smoke to the surface of the hair, the laboratory's aggressive washing process would prevent a hair sample contaminated in that manner from ever reaching the cutoff level. The washing process lasts three hours and 45 minutes. After the MS, a certifying scientist reviews the process for quality assurance and issues a final report on the samples.

Cairns interpreted the data contained in the Laboratory Data Package [DX 2] which was produced by Psychemedics. He explained that it details the chain of custody with respect to the hair sample, and what happens to the sample once it arrives at Psychemedics. It also details the analytical results of the tests conducted on hair samples

[2] Department's Exhibit (DX) 1 is a copy of In the Matter of the Adoption of Baby Boy L, 596 N.Y.S.2d 997 (1993). In this decision, a Suffolk County Family Court adoption case, Doctor Jesse Bidanset, who at the time was Chief Consulting Toxicologist at Inter-City Testing Corporation and a professor at St. Johns University's Department of Pharmaceutical Sciences, recognized that "the RIA process, when properly conducted and controlled, yields a reliable result which is accepted by the relevant scientific community."

collected from the Respondent's arm on August 1, 2006. Cairns testified that on page 6 of the package is a copy of the collection report with the donor's employee identification. It states that the Respondent's photo identification was used to identify him. Cairns stated that records from the Department's Medical Division identify the subject identification as 16-2352-06-XH which was, in fact, the Respondent.

The package indicates that the Respondent's first sample underwent RIA analysis and came back with a presumptively positive result. Two more hair samples were, therefore, washed and subjected to MS analysis. Both of these samples tested positive. The first was found to have a cocaine level of 123ng/10mg and the second was found to have a cocaine level of 105ng/10mg. All of the cocaine metabolites were present in both samples. According to Cairns, the test results indicate multiple ingestions of cocaine six to seven months prior to the date the samples were collected. He testified that he offers this opinion with a very high degree of scientific certainty, and he explained that the only rational explanation for the metabolic markers found in the samples is the direct ingestion of cocaine.

DX 3 is a copy of a Laboratory Report from Quest Diagnostics (Quest). According to the report, a hair sample was collected from the Respondent and sent to Quest by a Sergeant Herdsman. It was received by Quest on September 16, 2006. The report indicates that the sample contained cocaine at a level of 132.7ng/10mg, the cocaine metabolite benzoylecgonine (BE) at a level of 6.9ng/10mg, cocaethylene at a level of .8ng/10mg, and norcocaine at a level of 2.56ng/10mg. These Quest results were reported without reference to cutoff levels. According to Cairns, the results definitely indicate deliberate multiple ingestions of cocaine.

DX 4 is a copy of another Quest Laboratory Report. This report indicates the results of analysis conducted on a hair sample that was collected from the Respondent's leg on August 18, 2006. On this second report, under a column labeled "Hair Substance Abuse Panel," it is indicated that the sample tested positive for cocaine but tested negative for BE, cocaethylene, and norcocaine. Under a column labeled "Hair Quantitative Results," however, it is indicated that BE was in fact present in the sample at a level of 120pg/mg. In explanation of this discrepancy, Cairns testified that follow-up samples used to challenge original test results are tested without regard to cutoff levels, but are instead tested for any presence of drug or metabolite. According to Cairns, this test confirms the conclusion that the Respondent ingested cocaine on multiple occasions in the six to seven months prior to collection.

DX 5 is a copy of a report prepared by Dr. Jesse Bidanset, a forensic toxicologist who prepared the report at the request of the Respondent. The report was dated September 9, 2007. Cairns testified that it was unusual that Bidanset did not review either of the Quest Diagnostic test results (DX 3 and 4) in preparation for his report. According to Cairns, not reviewing the Quest results would have had a significant impact on Bidanset's evaluation. He stated that the fact that the Quest results validate the Psychemedics results is a "very important piece of toxicological information" and without any discussion of the Quest results Bidanset's report is "partially one-sided."

Bidanset wrote in his report that from the majority of forensic studies "one finds that the deposition of drugs in hair follicles probably results from incorporation of the blood" Cairns testified that Bidanset's use of the word "probably" in this sentence is inaccurate since the scientific community has already resolved that blood is, in fact, the

major route for cocaine to get into hair. Although Bidanset also wrote in the report that "additional drug can be deposited in the hair through . . . delayed incorporation from the surrounding tissue," Cairns testified that scientific study has never established this fact.

Cairns testified that he disagreed with Bidanset's statement that "[i]n the case of cocaine, hydrolysis to BE, re-esterification with ethanol to coaethylene, and oxidation to norcocaine could have occurred in another user, whose body fluids served to provide external contamination of [the Respondent's] body hair." Cairns explained that one reason this statement by Bidanset is erroneous is that the evidence does not suggest that the substances found in the Respondent's hair resulted from external contamination. In support of his theory on external contamination, Bidanset cited an article entitled "Decontamination Procedures for Drugs of Abuse in Hair: Are They Sufficient?" by Blank and Kidwell. According to Cairns, however, Blank and Kidwell used testing procedures that differed from the FDA-approved procedures used at Psychemedics. Cairns testified, in contrast, about a Canadian professor named Koren who investigated external contamination at great length and also used Psychemedics testing procedures. This investigation, according to Cairns, came to a conclusion that even an individual in a room with five thousand lines of cocaine would not test positive in a hair test conducted at Psychemedics.[3]

Bidanset also cited Guido Romano's article "Hair Testing for Drugs of Abuse: Evaluation of External Cocaine Contamination and Risk of False Positives" to support his theory on external contamination. Romano's study involved test subjects stroking cocaine on their hair. According to Cairns, Romano untruthfully reported in his article

[3] Cairns subsequently identified the Koren article as, "Hair Analysis of Cocaine: Differentiation Between Systemic Exposure and External Contamination."

that he used Psychemedics washing procedures in his study. Cairns testified that when he later repeated Romano's study at Psychemedics, he found that none of the samples tested positive for cocaine.

While Bidanset stated in his report that "street samples of cocaine frequently contain up to 13% BE," Cairns testified that he has never seen data indicating that 13% is a consistent level of BE. Moreover, Cairns disagreed with Bidanset's statement that "[d]rugs such as cocaine, absorbed into the hair, may also degrade to their metabolites resulting in a profile similar to active use." Cairns explained that this statement is incorrect because it does not consider either the cutoff level that would have to be reached for the hair to be deemed positive or the aggressive washing that hair samples undergo at laboratories such as Psychemedics. He further explained that BE is very water soluble and is, therefore, easily washed off when aggressive washing procedures are employed.

Something that Cairns did agree with in Bidanset's report is the statement that the presence of BE indicates active cocaine use. Cairns disagreed, however, with Bidanset's assertion that the presence of this metabolite "is further evidence that the contamination had to have come from a user that was in immediate contact with [the Respondent]." Cairns explained that the cutoff level and aggressive washing procedures employed by Psychemedics remove the possibility of environmental contamination like Bidanset described in his report from causing a hair sample to test positive.

In reference to the washing procedures, Bidanset stated in his report that Psychemedics did not successfully decontaminate the Respondent's hair samples since the fifth (which is also the final) wash of the hair still demonstrated residual contaminant.

According to Cairns, however, Bidanset failed to consider that Psychemedics uses a mathematical formula involving the fifth wash residue to predict what would still be on the hair if it were washed for five additional hours. Cairns testified that had Bidanset considered this formula, it would have been clear to Bidanset that the Respondent's case was one of cocaine ingestion, not one of external contamination.

Other articles cited by Bidanset in support of his theory on external contamination included "Cocaine in Children's Hair When They Live With Drug Dependant Adults" by Kidwell and "Drug Distribution in the Hair Axillary and Pubic Hair of Chronic Addicts" by Offidani. According to Cairns, these articles were based on flawed research since, among other reasons, the authors conducted their tests without employing the Psychemedics washing procedures or cutoff level.[4]

Bidanset stated in his report that a major shortcoming with the Respondent's test results was the use of body hair. According to Cairns, however, it seems that Bidanset has failed to notice that the FDA has given clearance to use body hair in drug testing. Moreover, Cairns disagreed with Bidanset's assertion that "[s]cience knows less about critical aspects of the growth and turnover of body hair, mechanisms of deposition, external contamination and rate of conversion or loss." Cairns explained that this assertion is a misrepresentation of the current scientific knowledge on hair testing.

Finally, Bidanset cited in his report an article by Edward Cone entitled "The Occurrence of Cocaine, Heroin and Metabolites in the Hair of Drug Abusers" to infer that

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[4] Respondent's Exhibit (RX) A is a copy of the telephonic deposition of Frederick Smith before the State Gaming Control Board, dated April 11, 1996. At the deposition, Smith, the co-author of "Cocaine in Children's Hair When They Live With Drug Dependant Adults," seemed to be discussing the testing methods that he and Kidwell used in their research. According to Smith, the hair samples that were used in the study were collected by a professional barber and any hair that fell was collected from the barbershop floor.

hair color or ethnicity or race may affect test results. According to Cairns, however, the author of this article based his study on 20 test subjects. Meanwhile, a second study that used 56,000 samples resulted in the conclusion that there is no correlation between test results and factors such as hair color, ethnicity, and race. Additional issues that Cairns had with the article were that the author did not comport with Psychemedics washing procedures, and Psychemedics removes the hair color from a sample before the sample is analyzed anyway. Cairns also stated that Psychemedics separates melanin from hair samples before testing.

On cross-examination, Cairns testified that he holds stock options in Psychemedics. According to Cairns, Psychemedics has tested five million hair samples, and to his knowledge the laboratory has never erroneously found a positive result. Over the last few years, he has testified on behalf of the Department on eight to ten occasions. He stated that around 1988 there was research into whether or not the race or ethnicity of a test subject could affect hair test results. Cairns explained that because external contamination can bind to melanin in the hair, it might be more likely for cocaine to bind to black hair than to blond hair. He further explained that while a test subject's level of external contamination may, therefore, differ slightly depending on the subject's race or ethnicity, recent studies have ultimately disproved any correlation between race or ethnicity and test results.[5]

Cairns testified that hair samples are typically taken from the vertex of the head. If a test subject does not have enough head hair, however, samples are collected from the

[5] Cairns could not recall the names of these studies, but he believed they were published by Forensic Science International starting in the 1990s. The studies, which were conducted by a Professor Miczkowitz from Florida State University, was what Cairns was referring to in direct examination when he mentioned a study involving 56,000 hair samples.

body. Because the sample collector must gather at least 40 or 50 milligrams of hair, he will choose a body area based on the availability of hair. Cairns testified that he is not aware of any other laboratory that uses washing procedures identical or similar to those employed at Psychemedics. According to Cairns, cases where there is still cocaine residue in the fifth wash are generally cases involving habitual cocaine users. Cairns explained that because a sample of leg or arm hair represents a period of seven months, the Respondent's samples would have represented a period dating back to February 2006.

Cairns testified that hair grows more slowly in an older person than it does in a younger person. Other factors that might slow the hair growth rate include severe thyroid condition, alopecia, diabetes, and diet. Cairns reiterated that the bloodstream is the route by which drugs become incorporated into hair. Sebum, which is a sort of lubricant for hair growth, is a second but very minor route of drug incorporation into hair. Cairns explained that "incorporation" is the process by which a drug becomes trapped within the microfibril structure of the hair. When a drug is trapped inside the microfibril, some of the drug will bind to melanin inside the hair.

In contrast to incorporation, external contamination is the process by which a drug is deposited on the outside of the hair. Sweat can be a method of self-contamination, meaning an individual's hair becomes contaminated by his own sweat. It is also possible, though, for the sweat from one individual to contaminate the hair of another if two people are in close contact with each other. Cairns stated that tests cannot determine whether externally contaminated hair was self-contaminated or became contaminated by the sweat of another person. He testified that as far as he knows sweat does not cause drugs to bind to hair, and differences in hair texture do not cause drugs to bind differently.

In an article entitled "The Potential for Bias in Hair Drug Testing for Drugs of Abuse," Edward Cone discussed a study that was conducted by Henderson and Harkey into "the incorporation of drug into ethnic hair types which differed in hair color and hair treatments." Based on this study, Cone concluded that "drug incorporation into hair may be influenced by a combination of variables, including hair color, ethnic hair type, and chemical treatments of hair." Cairns testified that he disagrees with this conclusion because the Henderson and Harkey article was based on 21 test subjects, while larger scale studies have concluded that there is no such thing as racial or hair color bias. Moreover, according to Cairns, the study conducted by Henderson and Harkey was a "soaking study," which means different hair types were soaked in cocaine to see how much of the drug the hair would absorb. In other words, the Henderson and Harkey study was technically a study of external contamination, not a study of incorporation (which takes place only through the bloodstream and sebum). Cairns testified that even if the study had involved exposing the hair samples to cocaine vapor, it would have still been a study of external contamination, not incorporation. Cairns further testified that because the Cone article is a chapter in a textbook, it did not undergo the peer-review process that articles published in professional journals must undergo.[6] He explained that while an article that has not been peer-reviewed may be of scientific value, the accuracy of the article may be challenged by future publications.

On redirect examination, Cairns reiterated that Cone based the article "The Occurrence of Cocaine, Heroin and Metabolites in the Hair of Drug Abusers" on 20 test subjects, which is a very small statistical number. Cairns also reiterated that Cone

[6] The Cone article can be found as a chapter in the textbook entitled "Drug Testing in Hair," which was edited by Pascal Kintz.

employed washing procedures that were less aggressive than the ones used at Psychemedics. Cone's washing process consisted of washing the hair in methanol for approximately three minutes. [DX 6 is a copy of this Cone article.]

Cairns testified that Psychemedics conducted a follow-up study to Cone's article. In this follow-up study, Psychemedics washing procedures were employed, and all of the samples tested negative for drugs in spite of the level of contamination that was put on the hair. [DX 7 is a copy of the follow-up article, which is entitled "An Evaluation of Two Wash Procedures for the Differentiation of External Contamination Versus Ingestion in the Analysis of Human Hair Samples for Cocaine." It was written by Schaffer, Wang, and Irving, and it was published in the Journal of Analytical Toxicology.]

Finally, Cairns discussed an article entitled "Hair Analysis of Cocaine: Differentiation Between Systemic Exposure and External Contamination," by Koren, Klein, Forman, and Graham. According to Cairns, this article concluded that when Psychemedics washing procedures are employed, exposure to crack cocaine vapors (even at a high level) would not cause positive test results. [DX 8 is a copy of the Koren article.] Cairns testified that because of the aggressive washing procedures at Psychemedics, sweat from a cocaine user could not cause a non-user's hair to test positive, much less cause the non-user to reach the high levels of cocaine that were found in the Respondent's hair.

Upon questioning from the Court, Cairns explained that the cocaine level found in the Respondent falls in the range of regular use on a weekly basis.

On rebuttal after hearing Bidanset testify, Cairns was recalled as a Department witness. He stated that an arm hair sample reflects a period where one can look back to drug use approximately six months. Since the Respondent was tested on August 1, 2006, one could look back to drug use as far back as February 1, 2006. Cairns noted that the period in the Department charges, between May 1 and August 1, 2006 fell within this six-month look-back period in the Respondent's case. He further stated that the Respondent's test results, therefore, indicate that the Respondent ingested cocaine on multiple occasions between May 1 and August 1. Cairns testified that there are no over-the-counter medications, prescription medications, or legal dietary supplements that can mirror the Respondent's hair test results. He stated that the Respondent's results could not possibly be indicative of external contamination by skin-to-skin contact or sweat since cocaine that is transferred by that method does not become trapped in the hair and would be removed by the aggressive Psychemedics washing procedures. Cairns explained that, based on all of his research studies on aggressive washing procedures and sweat, there is no scientific evidence whatsoever that even frequent skin-to-skin contact could result in the level of cocaine and the metabolites found in the Respondent's hair.

On cross-examination, Cairns testified that three or four years ago Cone published an article in which he (Cone) was unable to differentiate external contamination from ingestion. Cairns explained that because Cone did not wash hair samples aggressively, the study erroneously concluded that the drug remaining in the hair after washing was the result of ingestion. Cairns could not recall the name of the Cone article. According to Cairns, Cone and Blank and Kidwell used in their research methodologies that are entirely different from the ones used at Psychemedics. He specified that not only does

Psychemedics employ superior washing procedures, but it also uses cutoff levels, a BE ratio, and metabolic profiling of the samples.

Cairns testified that BE can be transferred in sweat, but he reiterated that BE is highly water soluble and easily removed by washing. He stated that external contamination can be washed off, regardless of concentration of the drug or how long the test subject was exposed to the drug.

Police Officer Grace Francis

Francis, a 12-year member of the Department, is currently assigned to the School Safety Division Uniform Task Force. She testified that on August 17, 2007, she was instructed by her supervisor, Lieutenant Brian Crowley, to inform the Respondent of a September 13, 2007 court date. At approximately 12:00 p.m. on August 17, 2007, Francis informed the Respondent of the court date over the telephone. According to Francis, the Respondent replied that he was already aware of the court date but that it had been postponed. Francis proceeded to relay to Crowley the Respondent's message about the court date's postponement. Francis at no point told the Respondent that he did not have to report to court on September 13, 2007, and she had no further conversation with the Respondent about the notification. [DX 10 is a copy of a notification for the Respondent to report to the Department Advocate's Office on September 13, October 23, 24, and October 25, 2007. Although the notification is dated August 17, 2007, Francis testified that this notification is not the same one that she saw on that day. According to Francis, the notification that she saw referred to only the September 13 court date, not the October court dates.]

Upon questioning by the Court, Francis testified that had a court date been cancelled, either she or somebody else in the office would have informed the Respondent.

Lieutenant Brian Crowley

Crowley, a 14-year member of the Department, is currently assigned to the School Safety Division Uniform Task Force. He testified that on August 17, 2007, he received by fax a court notification for the Respondent. The notification instructed the Respondent to report to the Department Advocate's Office on September 13, 2007. Crowley gave the notification to Francis and instructed her to inform the Respondent of the court date. Crowley was approximately four feet away from Francis when Francis placed a telephone call to the Respondent and informed him of the court date. Crowley stated that he heard Francis tell the Respondent that he needed to appear in court in either the uniform of the day or business attire and that representation was needed. Crowley did not recall, though, if Francis had any further conversation with the Respondent. After the telephone call, Francis told Crowley that, according to the Respondent, the court date had been canceled or postponed. Crowley testified, however, that he had never received a notice of cancellation or postponement for the Respondent's court date.

On cross-examination, Crowley testified that the document admitted into evidence as DX 10 was the actual notification that Francis read to the Respondent on the telephone on August 17, 2007. He stated that he is not the only person in the command who might receive a notification or a notice of cancellation. He further stated that a notification could be made to a member of the command without his knowledge.

Upon questioning by the Court, Crowley testified that there are two police officers who work in his office and might receive notifications. According to Crowley, when he asked these officers if they ever received a notice of cancellation for the Respondent's court date, neither officer acknowledged that fact.

On recross-examination, Crowley testified that he is not aware of any occasion where a court date was cancelled but he was not notified of it.

Respondent Police Officer Brian Alexander[7]

The Respondent, currently assigned to the School Safety Division Uniform Task Force, testified that he was notified by Francis to report to the Department Advocate's Office on September 13, 2007. He stated that he never received a cancellation of that notification from any member of the Department, but he did not appear at the Department Advocate's Office on that day.

On cross-examination, the Respondent testified that his attorney was not present at the Department Advocate's Office on September 13, 2007. He explained that approximately a week before he received the notification from Francis about the September 13, 2007 court date, he was in One Police Plaza and was informed that the court date had been changed. He stated that he is on suspended duty status and was not assigned to the School Safety Division Uniform Task Force on September 13, 2007.

[7] The Respondent was called out of turn as a witness on the Department's case solely on the issue raised in Specification No. 3, the Respondent's failure to comply with a personal directive.

Police Officer Barry Morris

Morris, a ten-and-a-half-year member of the Department, is currently assigned to Transit Bureau District 32. He was previously assigned to the Medical Division, where he was responsible for collecting hair samples for random drug tests. He testified that he personally received training from Psychemedics personnel and also passed a test on the subject. During his time at the Medical Division, he collected thousands of hair samples.

Morris testified that on August 1, 2006, he collected hair samples from the Respondent. He explained that before the Respondent's hair was collected, the Respondent was identified by his Department issued identification card. He was then assigned a specific drug screening number. After a review of the Laboratory Data Package [DX 2, Morris testified that the Respondent's number was 16-2352-06-XH. He explained that the "16" meant that the Respondent was the 16th person tested on that date; that "2352" meant he was the 2,352 person tested for the year 2006; "X" meant his test was random, and "H" meant his hair was tested. He further explained that no other individual in the Department was assigned that number. Morris stated that from the data collection envelope, paperwork was completed by both him and the Respondent prior to the hair collection.

Morris said that prior to the Respondent's hair collection, the table in the collection room was cleaned with alcohol and covered with a clean piece of butcher's block paper. Morris then used a disposable razor wrapped in plastic that had never been used before to shave the Respondent's arm, letting the hair fall on to the paper. Morris then separated the Respondent's fallen hair into three equal samples. Each of the samples was placed in its own collection envelope, and each envelope was closed using an

integrity seal that was signed and dated by the Respondent. Morris explained that two of the Respondent's samples were sent to Psychemedics for analysis. The third sample was kept in a safe at the Medical Division for future testing should it become necessary. [DX 11 is a drug collection kit, which consists of an envelope, aluminum foil, an integrity seal, and an alcohol pad.]

On cross-examination, Morris testified that his training consisted of watching a video, an hour-long demonstration, and a 20-minute follow-up exam. The demonstration involved collecting hair from the head. Collecting body hair was discussed in training but was not demonstrated. He also stated that he was a registered nurse and performed duties such as administering flu and hepatitis shots that nurses assigned to the Medical Division would perform. In August 2006, Morris had been collecting hair for approximately a year. Morris wore gloves on his hands while he collected hair samples. He explained that when collecting hair from the head, he would cut 135 strands of hair for each sample. Similarly, when collecting hair from the body, he would shave until it looked like an amount of hair comparable to 135 strands had been gathered. Morris testified that he did not specifically remember collecting hair from the Respondent. He explained that the alcohol pad contained in the kit was used to clean the scissors prior to head hair collection. It was not used for body hair collection.

Upon questioning by the Court, Morris testified that he did not wear gloves while he cleaned the table. On redirect-examination, he stated that he used fresh gloves for each hair collection. During further cross-examination he explained that he adorned gloves prior to actually shaving the hair. He obtained the gloves from a box located on the corner of the hair collection table.

Police Officer Markland Clarke

Clarke, an eight-year member of the Department, is currently assigned to the Medical Division, where he is responsible for collecting hair samples. He testified that on August 1, 2006, he was responsible for retrieving from the Drug Screening Unit's hair locker the samples that were collected that day. He explained that he would have placed two of the Respondent's hair samples in a DHL envelope, sealed the envelope, and brought the envelope to the Sick Desk Supervisor. According to Clarke, the Sick Desk Supervisor would have then recorded the samples in a log and secured the envelope in a hair locker at the Sick Desk until DHL picked it up. Meanwhile, Clarke would have brought the Respondent's third hair sample to the Sick Desk Supervisor in a sealed brown Department envelope. This brown envelope, according to Clarke, would have been secured separately by the Sick Desk Supervisor in a second locker. [DX 12 is a DHL envelope.]

On cross-examination, Clarke testified that he could not recall who the Sick Desk Supervisor was that day.

Official Department Interview of Respondent Police Officer Brian Alexander

The Respondent was interviewed on September 26, 2006 by Detective Green. Also present at this interview was Lieutenant Richard Avignone. The allegation was that on August 17, 2006 at Lefrak Plaza Medical District the Respondent failed a random Dole test. The Respondent, a police officer assigned to the School Safety Division Uniform Task Force, stated that he was satisfied with his legal representative and that he understood that he was being interviewed as a subject in this matter. The Respondent was

read the provisions of the Patrol Guide 206-13, as well as Patrol Guide 203-08, and he stated that he was familiar with the Department's policy on answering questions as part of an official investigation and also the Department's policy regarding the making of false statements.

The Respondent was questioned as to whether he was aware that his test results were positive for cocaine at a rate of 123 nanograms, when the positive cutoff rate is 5 nanograms. He was also questioned as to whether he understood that this was a very high positive level. The Respondent stated that he was aware that the Department had a zero tolerance policy for drugs. [redacted] The Respondent denied that he ever smoked, consumed, or ingested any narcotics that could have explained his positive results.

The Respondent stated that he was taking proteins and vitamins while he worked out. He explained that he purchased the vitamins at the Vitamin Shoppe. He stated that he had been consuming the vitamins three times a day for approximately one year. Once he received his positive test results from the Department, he stopped consuming the vitamins. The Respondent also stated that he had a private test result done which also came back positive for cocaine at a very high level. The Respondent said that in his research, although he found that one of the vitamins he was consuming could cause a false positive for marijuana, none of his research determined that any of the vitamins he was consuming caused a false positive for cocaine.

The Respondent described a scenario that he has going on in his life. [redacted] He stated that approximately three months earlier at Family Court there was an argument between his girlfriend and her ex-husband named [redacted] At the courthouse [redacted] threatened the Respondent by stating, "I'm going to take your job from you." The Respondent said initially he did not think anything of this but that once he testified positive for drugs he wondered if the threat that [redacted] made had anything to do with his positive test result. He stated that he filed a complaint with the Department regarding the threat that was made by [redacted] He also stated that his girlfriend as well as his girlfriend's best friend named Darryl had access to his [the Respondent's] apartment. The Respondent acknowledged that his girlfriend had access to his apartment as well as Darryl, and that Darryl was not a close friend of his even though he knew him for approximately two years. The Respondent said that he wondered whether Darryl had done anything to his apartment because he was friends with [redacted] The Respondent stated that his girlfriend

did not have a drug problem. He stated that he did not know if [redacted] had a drug problem. He explained that his girlfriend stated that [redacted] may have used marijuana but she was not sure whether he had consumed cocaine. The Respondent also stated that he had never seen Darryl do any drugs. The Respondent denied having any access to drugs while working. He stated that he never did a line of cocaine while working and the most he has done during the course of his duties was to obtain seized bags of marijuana. He has never obtained cocaine from students.

The Respondent stated that he has not had any health problems and that he has felt fine dating back to May of 2006 up until the point of his test on August 17, 2006. He also stated that he does not take any herbal supplements. The Respondent said that when he took his Dole test he failed to list the vitamins he was taking because he did not remember their names. He also stated that he listed that he was taking a prescription for shoulder pain but he could not recall the name of the medication at that time. The Respondent stated that once he found out he had a positive cocaine test, he did not contact his doctors to find out if the prescriptions could have caused a positive result; he simply conducted his own research. He said that he contacted the pharmacies where he had the prescription filled and they advised that the vitamins he was taking were not government regulated. He also stated that he found someone who tested the vitamins he was taking and this person told him that they did not contain cocaine. He said his research indicated that kidney infections, liver infections, diabetes, Amoxicillin, as well as tonic water could cause false positives. But he had his private doctor do a blood test and determine that he did not have any of these conditions.

The Respondent said that during the time he was dating his girlfriend she had prepared meals for him. He also stated that he had eaten food prepared by Darryl on several occasions. The Respondent stated that he ate food from various restaurants whenever he was in the neighborhood. He did not eat at a specific place. He stated that he had an investigator speak to Darryl and Darryl was convincing that he had nothing to do with the Respondent's positive drug test. The Respondent explained that Darryl was willing to take a lie detector test and he was planning to pay for him to take a lie detector test as well as his girlfriend. The Respondent stated that he had nothing to do with his own positive drug test result.

With respect to the vitamins that the Respondent was taking, he stated that one was called Lean Mass Complex. He explained that this was a meal supplement that he would take when he missed a meal. The other products were body-building supplements to give him energy while he worked out. The Respondent stated that all of the containers were sealed when he opened them and that none of the products had been opened before he consumed them. He acknowledged that one package came in a box of twelve. Another product he had to mix with another product that came in a container. He stated that he would occasionally mix the drinks overnight and place them in the refrigerator and consume them in the morning when they were cold. At other times he would come in from work and mix the drinks and refrigerate them.

The Respondent's Case

The Respondent called Doctor Jesse Bidanset, Shelley Bruce, and Lieutenant Andrew Walsh as witnesses, and testified in his own behalf.

Doctor Jesse Bidanset

Based on his qualifications, Bidanset was deemed an expert witness in the area of forensic toxicology.[8] He testified that he has been responsible for the analysis of hair samples in "a couple of dozen situations." He explained that blood and sebum are the sources by which drugs can be incorporated into hair. According to Bidanset, though, there are a number of instances where sweat can also contaminate hair. He clarified, "The blend of whether it is the sweat that is in the pore, or whether it is external is, I guess, a question I can't answer." He explained that external contamination is the process by which a drug gets absorbed into the hair after the hair fiber has surfaced from the skin or pore.

Bidanset testified that he has reviewed documentation relating to the current case. [RX B is a copy of a letter from the Respondent's attorney to Bidanset, dated April 13, 2007. The letter indicates that Bidanset was sent copies of the Psychemedics and Quest test results for his review.] Based on the documentation, Bidanset issued a report [previously admitted into evidence as DX 5]. Bidanset stated that the Blank and Kidwell article entitled "Decontamination Procedures for Drugs of Abuse in Hair: Are They Sufficient?" was a valid study that concluded that decontamination methods could not differentiate active drug use from external contamination. According to Bidanset, the

[8] Bidanset testified that he received a Bachelor's Degree in chemistry from Hofstra University and a PhD from Adelphi University with a major in organic chemistry and a minor in physical chemistry. He was previously employed as the chief toxicologist in Nassau County and as an adjunct professor in toxicology at St. Johns University. Since 1971, he has worked for a consulting firm. As a consultant, he was responsible for providing analytical toxicology and testimony for Rockland County for a period of 31 years. In addition, he has provided consulting services to the Palm Beach County (Florida) Sheriff Department's toxicology section. He is a member of the American Chemical Society, and is a charter member and founder of the Society of Forensic Toxicologists. In addition, he has fellowship status in the American Academy of Forensic Sciences Toxicology Section and the American Academy of Clinical Toxicology. He has been board certified since 1977 and has written more than 50 published peer-reviewed articles.

Guido Romano article that he cited in his report was also a valid study, a study into 30 or 35 different washing procedures. Romano ultimately concluded that none of the washing procedures could completely remove external contamination from hair samples. Bidanset testified that numerous publications have discussed the fact that decontamination techniques are not completely effective in removing external contamination and that this can lead to false positive test results. Bidanset explained that the removal process is so slow that most laboratories cannot invest the time to successfully complete decontamination. In support of his views on external contamination, Bidanset cited "Cocaine in Children's Hair When They Live With Drug Dependant Adults" by Kidwell. In a study of 30 families, Kidwell concluded that children that experienced external contamination with cocaine at home had positive hair test results.

Bidanset testified that the presence of BE in a hair sample does not necessarily represent cocaine ingestion since, contrary to what was formerly believed, pure cocaine can naturally break down to its metabolite even without ingestion. In fact, according to Bidanset, a sample of cocaine powder may contain as much as 15% BE. Bidanset stated that, thus, a hair sample that has been externally contaminated may contain some amount of BE, thereby giving the appearance of cocaine use. Bidanset explained that BE can also be generated when cocaine gets wet. He also explained that cocaethylene is formed when an individual with BE in his system consumes alcohol.

Bidanset testified that hair color, porousness, and chemical treatment are factors that affect drug absorption. Bidanset stated that he is aware of only one or two studies which have attempted a comparison of head hair with body hair. Those studies, according to Bidanset, have shown that a body hair sample can have a higher content of

cocaine than a head hair sample taken from the same person. Bidanset testified that the drug testing industry should, therefore, be cautious about applying the same cutoff level for both head hair and body hair.

In conclusion, Bidanset testified that he did not think that the analysis conducted on the Respondent's hair excluded contamination as a source of the cocaine and metabolites found.

On cross-examination, Bidanset testified that his notarized signature appears on a document from the Office of the Attorney General of the State of New York, dated November 30, 2006. [DX 9] The document indicates that Bidanset, as a principal in the corporation, Forensic Associates Incorporated (FAI), violated New York State public health law and breached a contract with Rockland County. Bidanset explained that although his signature indicates that he has read and agrees with the document, he was not in actuality an FAI principal but was merely a consultant to the corporation. He further explained that he signed the document in order to quickly resolve the issue, which was that FAI conducted forensic toxicology without having the proper license. According to Bidanset, he mistakenly believed that FAI had taken care of obtaining all necessary permits. As a result, Bidanset has agreed not to apply for a laboratory director certification until 2011. Although Bidanset worked as a forensic toxicologist in New York State for over 40 years, he has not held a license to practice forensic toxicology since 1979. He explained that a license is not needed to be a consultant. He stated that he has no experience with respect to workplace hair testing, has never written any peer-reviewed articles on workplace hair testing, and has not conducted hair testing on a large scale.

Bidanset testified that he did not actually use the Quest results in preparation of his report. He conceded that the Quest results were consistent with the Psychemedics results in that they indicated a positive presence for cocaine and its metabolite. He further conceded that there was no reason to doubt the validity of the Psychemedics or Quest laboratory reports. According to Bidanset, however, the consistent test results do not provide compelling proof of cocaine ingestion by the Respondent, but merely indicate a consistency in external contamination. Bidanset testified that he would have come to the same conclusion even if he had considered the Quest results, regardless of the fact that one of the samples analyzed at Quest was collected from the Respondent more than two weeks after the other samples were collected and the fact that Quest uses different washing procedures from Psychemedics.

Bidanset testified that he is aware Psychemedics employs a five-part washing procedure. He stated, however, that he does not know how long the Psychemedics washing process takes, what kind of analysis is conducted on the fifth wash residue, or what is done with the melanin in the hair samples. He testified that he is not familiar with Koren's research. He further testified, however, that his opinions on the Respondent's case would be the same even if he had known about the peer-reviewed study in which hair was externally contaminated by up to five thousand lines of cocaine and still tested negative after it was washed using the Psychemedics washing procedures. Bidanset stated that he is aware that Romano used significantly less aggressive washing procedures than those employed at Psychemedics, and he is also aware that Kidwell did not use a cutoff level in his study but merely looked for any trace level of drug. Bidanset testified that he did not know which wash procedures were employed in the studies that

he cited in his report or if any of those studies were conducted using Psychemedics procedures.

Bidanset testified that he does not know what the growth rate is for body hair. Upon review of "The Occurrence of Cocaine, Heroin and Metabolites in the Hair of Drug Abusers," Bidanset testified that he could not disagree with the following statement from the article: "Despite the lack of equivalent growth periods, the overall pattern of cocaine and heroin related anolytes found in arm hair was similar to that found in head hair."

On redirect-examination, Bidanset testified that in preparation for his report he considered the documents that he thought were relevant. He stated that his conclusions were supported by the evidence, and he still believes that there was a likelihood that external contamination occurred in the Respondent's case. Bidanset has prepared other reports similar to the one he prepared on behalf of the Respondent, and he stated that the report he prepared for this case was in keeping with the custom and practice of the forensic toxicology community.

On recross-examination, Bidanset testified that it was not custom and practice for him to prepare his report without considering the two confirmatory Quest results. He explained on continued redirect examination that the Quest results that he received did not have any chain of custody documentation or supporting information. Because the Psychemedics Laboratory Data Package was so much more complete, he relied solely on the Psychemedics analysis.

Upon questioning by the Court, Bidanset testified that he did not consider the analysis that Psychemedics conducts on the fifth wash residue, and he has never worked on a case in which there was enough cocaine residue in the wash solution to reach the

cutoff level. While a cocaine user can contaminate his own hair with his own sweat, the sweat of a user can also contaminate the hair of a non-user if close physical contact takes place. He stated that he did not know if this sort of cross-contamination could reach the cutoff level of 5ng/10mg, and he did not know of any study in which external contamination caused a hair sample to test positive for cocaine using that cutoff level. The Kidwell study cited in his report did not use a cutoff level but merely looked for any presence of drugs. According to Bidanset, RIA and MS are universally accepted in the scientific community and represent the "gold standard for chromatography. He also said that MS is the "gold standard for quantification and confirmational analysis" and having a cutoff level helps to give a testing procedure validation.

On continued redirect-examination, Bidanset testified that he did not think the Psychemedics Laboratory Data Package indicated how long the hair washing procedures lasted. He stated that even if the package had contained that information, it would not have impacted his conclusion that the washing procedures did not satisfactorily address the problem of external contamination.

Shelley Bruce

Bruce, who is currently employed in freelance, lived with the Respondent in Brooklyn for a period of two-and-a-half years. They have not lived together since September or October of 2006. Bruce testified that while they lived together, she smoked cocaine. She explained that she started smoking cocaine at the beginning of 2006 and would smoke it at home. She smoked in various rooms of the apartment, but she mostly smoked in the apartment's sole bathroom. Bruce stated that at one point in 2006, the

Respondent caught her smoking in the bathroom. Bruce had never informed the Respondent prior to that occasion that she smoked cocaine. She continued to use cocaine through June 2007.

On cross-examination, Bruce testified that she last used cocaine approximately three weeks ago. She stated that she is not under the influence of cocaine as she testifies at trial. The cocaine that she used three weeks ago she got from a friend and former coworker of hers named Darryl Matthews. Matthews was also her supplier of cocaine in 2006. According to Bruce, during the period that she and the Respondent lived together, she would meet Matthews near her family's house once or twice a week to pick up cocaine. At each meeting, Matthews would give her one or two tiny, clear plastic bags. Each bag contained enough cocaine to make two or three cigarettes. Matthews would give Bruce the cocaine for free.

Bruce testified that she would smoke the cocaine at home when the Respondent was not there. She would smoke one or two cigarettes a day. She explained that she would open up a regular cigarette, remove some of the tobacco, add some of the cocaine, and then close the cigarette up again. She reiterated that she mostly smoked in the bathroom, but she once smoked in the living room. She stated that she did not open the bathroom window when she smoked, and smoke from her cigarettes could have seeped through the bathroom door and entered the rest of the apartment. She testified that although she would turn the water on in an effort to rid the air of smoke, she would still be able to see some smoke in the air. Sometimes if the Respondent came home early, he might have been able to smell smoke in the air. As far as she knew, however, the time

that the Respondent caught her smoking in the bathroom was the only time that the Respondent actually smelled the smoke. Bruce has never been arrested.

Bruce testified that the time that the Respondent caught her smoking cocaine in the bathroom occurred in April, May, or June of 2006. When the Respondent asked her if she was smoking in the bathroom, she denied it. When the Respondent replied by telling Bruce not to lie to him, Bruce understood that the Respondent suspected her of using drugs. Bruce realized only at that point that cigarettes with cocaine do not smell the same as regular cigarettes. Bruce stated, however, that her conversation with the Respondent that day did not turn to her cocaine use. In September or October of 2006, Bruce finally confessed her drug use to the Respondent. At that point, the Respondent told her that she needed to move out.

Bruce testified that she is aware of the Respondent having a friend named Iris, but she would be surprised to learn that the Respondent claimed in September 2006 in an Official Department Interview that he had been living with Iris for the last two years. Bruce testified that she has never personally seen Iris, and she did not know if the Respondent and Iris ever lived together. Bruce testified that she was once married to a man named [redacted] is the father of Bruce's son. According to Bruce, [redacted] does not use drugs, has never lived with the Respondent, and did not have access to the Respondent's apartment while she and the Respondent lived together.

Upon questioning by the Court, Bruce testified that she tried snorting cocaine in January or February of 2006. Other than that, smoking cocaine in a cigarette is the only manner in which she has ingested cocaine. She has never smoked cocaine in a pipe. She

stated that while she lived with the Respondent she sometimes spent weekends at her family's house.

Lieutenant Andrew Walsh

Walsh is currently assigned to the Personnel Orders Section's Personnel Data Unit. He explained that his unit keeps biographical data on all Department members. Walsh testified that according to computerized Department records, the Respondent has been on suspended duty status since August 17, 2006. He stated that he does not know why the Respondent's duty status has not been changed to modified. [RX D is a copy of Personnel Order Number 243, dated August 23, 2006. It indicates that the Respondent's suspension became effective at 3:20 p.m. on August 17, 2006. RX E is a copy of an Operations Unit Report of Suspension/Modified Assignment, dated August 17, 2006. It indicates that the Respondent was suspended on that day.]

Respondent Police Officer Brian Alexander

The Respondent, who was most recently assigned to the School Safety Task Force Unit, has been on suspended duty status since August 17, 2006. He stated that on August 1, 2006 he reported to work at the School Safety Uniform Task Force, which was located in the 102 Precinct in Queens. He was notified that he was scheduled to take a drug test at the Medical Division, so he got into his car and drove to Lefrak City for the drug test. The Respondent stated that he walked into the medical office, completed a required form and sat in the waiting area until called. An officer then escorted him into another room. The Respondent stated that the room had a desk and two chairs, and he

was asked to sit down at the chair located at the side of the desk. He explained that the officer visually looked at his head and when he realized that he was bald, he requested that he roll up his own sleeves.

The Respondent testified that the officer left the room and returned with a long white clear paper and he put it on the table that the Respondent was seated at. The officer then directed the Respondent to stretch his arms outward. He then took one outstretched arm and began to push the hair on the arm in the opposite direction. He explained that the officer held one of his hands while he used the opposite hand to slide it along his arm from the wrist to the mid arm; pushing the hair back, causing the hair to stand at attention. He further explained that the officer then took a big disposable razor contained in a sealed plastic container, he removed it and began to shave the hair from the arm and let the hair fall onto the white plastic paper. This was done to both arms. The Respondent stated that the officer had a clear plastic bag, which he removed several foiled papers from inside of it. He used one foil paper to divide the hair into three piles. He then used his pointer finger to scoop a pile of hair into one of the foil containers and then repeated this process two more times and placed the other piles of hair each into a separate foil container. He then sealed each of the three foil containers.

The Respondent said that he signed and initialed each of the three, foil containers. The officer then took two of the containers and put them into one clear envelope. The other container was placed in a separate clear envelope. The two envelopes were sealed and the Respondent stated that he signed the envelopes. The officer then took the envelopes outside of the room, and he does not know what happened to the envelopes. The Respondent testified that he left the medical division and returned to his command.

The Respondent testified that on August 17, 2006 he was working at Canarsie High School when he received a telephone call from his supervisor. He was informed that IAB was looking for him and that he needed to return to the base as soon as possible. The supervisor informed him that he was going to send a van to pick him up. The van arrived in approximately ten minutes and transported him to the command. He was taken to a room where he met with a lieutenant and two sergeants from IAB, as well as a delegate. The lieutenant asked for his gun and Department identification card which the Respondent turned over as well as his Department gas card. The lieutenant informed him that his August 1 drug tests came back positive for cocaine. The Respondent replied, "I tested positive for cocaine. Not in God's green earth. I don't do cocaine or any type of drug. That is impossible." The lieutenant informed him that because of his positive drug test, he was on suspension, and if he had no further comment he could leave. The Respondent stated that he left the command and went home.

The Respondent stated that he immediately went on the Internet on his computer to find a location where he could have a drug test taken. He found the Drug Testing Network, which would conduct a hair test. He paid for the test by credit card and the next morning, a package arrived by Federal Express. He took the package that morning to a location on William Street in the Wall Street area. He turned over the package to the people in the facility. They opened the package, completed a part of the form and had the Respondent complete another part of the form. A nurse came back and escorted him to a private room in the facility.

The nurse then proceeded to remove hair from the Respondent's legs. He explained that she took a box that was stuck on the wall and removed a pair of gloves

which she put on. She then obtained a clear plastic bag and put it under his leg. She used a disposable Bic razor which she removed from a clear plastic container. She took a razor out and began to shave the hair allowing it to fall into a clear paper. He explained that she removed hair from both of his legs. The hair was then placed into one of several foil containers that were removed from the package that he carried to the facility. The container was sealed and the Respondent signed it. The container was then placed into a plastic envelope which was signed by both the nurse and the Respondent, and then the package was shipped off.

The Respondent stated that he was advised that the test results would be back in three to four days. He waited three days and then called the facility. He was informed that the test results came back positive for cocaine. He asked whether he could receive a copy of the report and the lab sent him a copy by e-mail, which he downloaded. [Respondent's Exhibit (RX) F which is a certification and Quest Lab Report]. The Respondent explained that even though his hair was taken at the Drug Testing Network, his hair samples were sent to Quest Diagnostics laboratory for testing.

The Respondent explained that after he received his Quest laboratory report, he began his own investigation. He further explained that he had been drinking a lot of proteins, both in pill form and powder form, and he was also working out physically. He said that he was very health conscious and was not eating meat, that he did not smoke, did not drink beer or drink any hard liquors. He stated that he did not put anything into his body that would be considered toxic. He could not recall if he informed the investigators during his Official Department Interview of this information. He decided to have the proteins that he was taking tested. His proteins were tested by his request as

well as by the supervision of his union. The Respondent testified that both test results came back negative for the presence of cocaine in the proteins he was consuming. The Respondent said that when he was interviewed by the Department, he supplied copies of all of the labels of the proteins that he was taking as well as the copies of the test results.

The Respondent said that he continued his investigation. He went on-line on the computer and discovered a term called, “false positive." His research found that if the human body is suffering from three medical conditions, he could test positive for cocaine. The three conditions were kidney disease, liver disease and diabetes. The Respondent explained that he went to his doctor, Dr. Froelich, and had him test to see if he was suffering from any of these conditions. After two weeks, the Respondent received results indicating that he was healthy and did not suffer from any of the conditions. The Respondent stated that he also came across another article, which said that certain prescription drugs can give a person a false positive for cocaine. He said that he had been taking two types of prescriptions, Penicillin and a painkiller for his shoulder, called Endonycin. He went to two different pharmacies and inquired whether the prescription drugs could make his body show a positive for cocaine. In both instances, the pharmacists advised him that the medications could not cause a false positive. The Respondent called the manufacturer of one of the prescription drugs called Vera, and was advised that taking the medication could not cause a false positive for cocaine.

The Respondent testified that on September 18, 2006, he went to the Eye, Ear and Throat Infirmary located on 14th Street and Second Avenue where an examination was performed on him. He also stated that on the same day, he went to Bendiner and Schlesinger who performed a urine test on him. In addition, the Respondent contacted a

forensic toxicologist named Dr. Segal whose specialty was in the area of drugs.[9] The Respondent explained that he learned from all of his research that one could test positive for cocaine even though he had not ingested cocaine simply by being in the environment of cocaine. He said that he learned from Dr. Segal about contamination. He learned that there are several ways that one could become contaminated, but one way is if a person is in a small area with no ventilation, and someone else is smoking cocaine or crack in that area. Even though the person is not doing crack or cocaine, he or she could test positive for cocaine in a hair test based on the exposure.

The Respondent stated that he shared his residence with Bruce from January 2004 until October of 2006. He explained that one night, following his discussion with Dr. Segal, he went to bed and started dreaming about an incident in his apartment. The dream was something that had occurred in the past that he remembered. He said that what he remembered had occurred in actuality. Bruce was in the bathroom. He heard water running. He wanted to use the bathroom, but Bruce was inside. She was taking so long that he decided to use the bathroom while she was in there. He grabbed the bathroom door handle and pulled open the door, but the door slammed shut. So he grabbed the door again with some force and held it. He noticed that Bruce had her pantyhose tied on the doorknob, and it was also tied to the towel rack. The Respondent demanded that she open the door, but he could hear rumbling inside the bathroom. Bruce stated that he needed to close the door so that she could untie the door. When Bruce untied the door, he observed that the bathroom was "all fogged up."

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[9] The Respondent was precluded from testifying about any test results performed on him by his private physician, the Eye, Ear and Throat Infirmary and the forensic toxicologist. This was based on the fact that none of this information was turned over to the Assistant Department Advocate as discovery despite the Assistant Department Advocate's repeated demands for reciprocal discovery from the Respondent's attorney.

He questioned Bruce about what she was doing and she replied that she was not doing anything. He asked her if she was doing drugs in the bathroom and she replied, "No." He asked her why her pantyhose was preventing him from entering the bathroom. He stated that he looked around the bathroom and did not see anything. Eventually Bruce stated that she was smoking. The Respondent stated that he did not hear the toilet flush and asked her what she was smoking. When she replied, “Cigarettes," he asked her where the wrapper was. He stated that he looked around the bathroom, near the toilet bowl and under the sink and he did not find anything. He explained that she went into the clothes hamper and pulled out a cigarette wrapper. He argued with her about throwing a cigarette into the hamper. He told her that the clothes could have caught on fire. Bruce stormed out of the bathroom and exited the apartment. The Respondent testified that it was at that point that he realized what Bruce was doing and that he may have been contaminated by her. He said this incident occurred in October 2006.

The Respondent testified that Bruce had been gone for a few days, so he called her and stated that they needed to talk. Bruce came to the apartment and he advised her that he was losing his job and his reputation and he needed to know whether or not she was doing drugs in his apartment. He explained to her that he was contaminated and he knew that she was doing this to him. Bruce denied using drugs. She then stormed out of the apartment. He stated that a few days later, Bruce called him and stated that they needed to talk. Bruce came over and admitted that she was smoking crack cocaine in the bathroom and in the living room of his apartment. The Respondent explained that he became upset and questioned Bruce as to why she could do this. He told her that he was

losing his job and that he was contaminated. And that his toothbrush and his son's toothbrush were contaminated. Bruce apologized and left the apartment.

The Respondent said that on August 1, 2006 the date that he was ordered to report to the Medical Division, he was unaware of the existence of Interim Order No. 9 that was issued May 25, 2006. He stated that he never used drugs that were not prescribed. He also stated that he was aware of what a controlled substance was and that he never used any controlled substances of any kind at any time. He said that he never used any illicit drugs; never ingested, smoked, snorted or ate any illicit drugs. He admitted that he drove to and from the Medical Division on August 1, 2006, the date of the Department test. He stated that he has driven a vehicle to and from work and that he has not had any accidents while employed by the Police Department.

The Respondent stated that during his Official Department Interview, he provided the supervisors with the test results from Quest Diagnostics. He also turned over copies of the bulletins for the proteins, vitamins and supplements, as well as the labels for the products he was consuming. He said that they asked him who had access to his apartment and he advised them that Bruce as well as a friend of hers named Darryl had access to his apartment. When they inquired why Darryl had access to his apartment, he explained that Darryl was looking for a job and did not have access to the Internet, so he let him use his apartment to “surf the internet” to find a job. He said they inquired whether Darryl and Bruce used cocaine. The Respondent said he was unaware and had never seen Darryl use cocaine. He also stated that at the time of his interview, he was unaware that Bruce used cocaine so he said that she did not use cocaine.

During cross-examination, the Respondent stated that he lived with Bruce from January 2004 to October 2006. He said that he could not recall stating during his direct examination that he lived with Bruce from January 2005 until October 2006. The Respondent stated that he was not living with Bruce on the date of his Official Department Interview, September 26, 2006 because they had a fight and she left the premises. He said that she returned to the apartment in October of 2006 to the best of his recollection. He estimated that their argument took place two weeks before the Official Department Interview. The Respondent explained that this argument was about his unemployment and the fact that he was stressed. He stated that he had not worked for a while and had no income coming in. Bruce could not understand his behavior, and they were not getting along. The Respondent said this argument had nothing to do with him confronting Bruce about her drug use. The Respondent stated that his argument with Bruce about the drug use took place after she moved back into the apartment in October 2006.

The Respondent testified that prior to the bathroom argument he had with Bruce in October 2006, he had absolutely no suspicions that Bruce was using drugs. He acknowledged that Bruce testified that she smoked cocaine by removing some of the tobacco in a cigarette and lacing it with the cocaine. The Respondent stated that he never smelled any rotten cigarette smell either in his living room, bedroom, on Bruce or her clothing. The Respondent explained that his apartment was filled with the scent of perfume, burning candles and potpourri. He said that neither he nor Bruce smoked cigarettes. He also said that he never smelled cigarette smoke either in his apartment, on Bruce or her clothing while Bruce had been living in his apartment.

The Respondent acknowledged that Bruce admitted to him that she had been using drugs in the apartment. When the Respondent was asked whether he recalled Bruce's testimony that she had not made such an admission, the Respondent stated that he confronted Bruce and she admitted drug use to him. He explained that Bruce stated that she smoked cocaine in the bathroom and in the living room and that she did not know by doing it that it would affect him and that she apologized for doing it. He estimated that Bruce admitted this in February of 2007 and that was when she moved out of the apartment permanently. Regarding the bathroom incident in October 2006, he was unaware that Bruce was using drugs at that time. It was not until he had a dream about the incident that he understood what had happened. The Respondent admitted that aside from his belief that Bruce contaminated him by her drug use, he had no other explanation for his positive cocaine test result.

Upon questioning by the Court, the Respondent stated that from January 2004 to October 2006 he did not live with any other female other than Bruce during that period. He also stated that he did not date anyone else during that period. He said that his apartment was a studio apartment and he did not smell any foul smells at any time. The Respondent acknowledged that he has been a police officer since 1994. He stated that during the course of his employment he has never smelled the scent of a cocaine-laced cigarette. He also stated that he is unfamiliar with the smell of burning cocaine. He explained that in his career he has made only one narcotics arrest and he has not had any dealings with narcotics. He also stated that none of his family members or close friends consumes drugs so he is unfamiliar with the smell of crack-cocaine.

FINDINGS AND ANALYSIS

Prior to the commencement of this trial, there were several pre-trial motions that were addressed. A synopsis of the pretrial motions and the outcomes are summarized below:

1. MOTION TO DISMISS

On or about March 13, 2007, the Respondent submitted a Notice of Motion to Dismiss, along with an Affirmation in Support of the Motion to Dismiss this cause of action. The Respondent based its motion to dismiss on a decision rendered by an Order of the Office of Collective Bargaining, Board of Collective Bargaining (hereinafter, "the Board").[10] The Board, according to the Respondent, found that the "NYPD's adoption of RIAH (hair testing) as a prescribed mechanism of drug screening" was improper since the Department had not negotiated with the unions to change the drug testing policy. The Board ordered that the remedy to the city's violation was that the city had to rescind the changes it made to the drug screening procedures implemented on August 1, 2005.

The Respondent argued that on December 4, 2006, the effective date of the order, the hair analysis test was found to be an improper practice and that the New York City Police Department was directed to rescind the changes in the drug screening procedure. The Respondent further contended that the order also directed that the New York City Police Department restore the drug screening procedures in effect prior to that date and that the Department "cease and desist" from implementing such changes until such time as the parties negotiate the changes. The Respondent argued that the rescission was retroactive.

[10] The Board decision was based on an improper practice proceeding brought by the Captains Endowment Association, Petitioner, against the City of New York and the New York City Police Department, Respondent, dated December 4, 2006.

The Respondent argued that as a consequence of this decision by the Board, the New York City Police Department was without authority to administer the hair analysis test to the Respondent. The Respondent further argued that the Department was without authority to: A) discipline the Respondent on the test result; B) suspend the Respondent from duty; and C) conduct a hearing on the Charges and Specifications that emanated therefrom. Based on these factors the Respondent requested that the Motion to Dismiss the Charges and Specifications be granted, that the Respondent be restored to full duty with retroactive pay and such other relief that the Court deemed just improper.

On or about March 22, 2007, this tribunal received the Department Advocate's Response to the Motion to Dismiss. The Department stated in sum and substance that on September 26, 2006, the Respondent was served with Charges and Specifications dated August 21, 2006, alleging that he wrongfully possessed and ingested cocaine. These allegations were based on the positive results for cocaine from a random drug test which was conducted on August 1, 2006. The Department noted that on December 4, 2006, the Board decided whether the City of New York and the Department had exceeded accepted collective bargaining guidelines by changing the methodology of random drug screening from the use of urine to hair. The Board decided that such methodology change should be the subject of collective bargaining. The Department noted that it complied with the Board's decision by rescinding the August 1, 2005 changes to the drug screening procedures.

The Department contended that the Board noted in its decision that no specific evidence was presented regarding discipline imposed on any members of the Captain's Endowment Association as a result of the modified methodology for drug screening. The

Board did not find that the "annulment of any discipline, or the expungement of any disciplinary records, as requested by the Union is warranted." Therefore the Department argued that the Board's decision had no effect on pending disciplinary matters. The Department contended that the Board's decision recognized and affirmed that the New York City Police Commissioner has ultimate authority on disciplinary matters concerning police officers; including the suspension of uniform members of the service for testing positive for the use or possession of controlled substances (Cited was Patrol Guide Section 205-29. Also cited was the New York City Administrative Code Section 14-115, which noted that public policy dictates that discipline of uniform members of the Department is subject to the Police Commissioner's exclusive authority).

The Department further argued that the authority of the Police Commissioner to discipline members of the service was not subject to review by the Board. To support its position, the Department stated that on March 20, 2007, the Board rendered its decision in SBA v. City of New York, Docket No. BCB-2603-07 (INJ), which related to issues raised by the Sergeants Benevolent Association. A Sergeant Jackson had been randomly drug tested on August 21, 2006 and was suspended from duty on September 7, 2006 as a result of a positive drug test result received by the Department. Because hair and not urine was collected from Jackson for the test, Jackson sought injunctive relief from the Board asking that the Department disciplinary matter stemming from the positive result be curtailed based on the Board's decision in the Captains Endowment Association matter. The Board wrote in its March 20, 2007 decision, "after a thorough discussion of the issues raised in this matter the Board voted to deny the petitioner's request for injunctive relief because it appears that the underlying improper practice petition is

untimely." Pursuant to the Rules of the City of New York section 1-07 (b) (4), for an improper practice petition to be timely it "must be filed within four months of the alleged violation and shall be on a form prescribed by the Office of Collective Bargaining."

In the instant matter, the Department argued that the Respondent's hair was collected on August 1, 2006 and he was suspended on August 17, 2006; while Jackson's hair was collected on August 21, 2006 and he was suspended on September 7, 2006. The Department contended that since the Respondent's matter occurred before that of Jackson, and Jackson's petition was time-barred, any such improper practice petition filed by the Respondent would be similarly time-barred by the Board. Based on these factors the Assistant Department Advocate requested that the Respondent's motion to dismiss this matter be denied in all respects.

On or about March 30, 2007, this tribunal received the Respondent's Reply Affirmation in Support of Motion to Dismiss dated March 28, 2007. In sum and substance the Respondent contended that the Department failed to address the issue that the Department had no authority to administer the hair test to the Respondent. The Respondent also contended that the Department failed to address whether this Court could hear the motion to dismiss and whether this Court had jurisdiction over the matter. The Respondent repeated the argument that the Department lacked the authority to administer the hair test. The Respondent also argued that there were differences between the injunctive relief sort by the sergeant from the Board versus the application to dismiss the Charges and Specifications at this tribunal brought by the Respondent. The Respondent stated that reference by the Department to the Rules of the City of New York and the four-month window with which to apply for a proceeding before the Board is

misplaced. The Respondent repeated the argument that he could not be suspended or disciplined and requested the same relief from the Court.

This Court rendered its decision on April 10, 2007. The Respondent had asserted that the decision of the Board was retroactive. The Court reviewed the Board's decision in its entirety and did not find any language which suggested that it was retroactive. In fact, the decision of the Board stated in no uncertain terms on page 13, "[H]owever, the Union did not submit specific evidence concerning discipline imposed on any members as a result of the changed procedures, therefore we find no basis to warrant the annulment of any discipline or the expungement of any disciplinary records, as requested by the Union." Based on this language, the Board in its decision was not setting aside any discipline or records of discipline in its order.

This Court noted that the Department cited a subsequent Board decision where the Board found that a sergeant who requested injunctive relief from the Board was denied said relief as being untimely. The Respondent, in his reply stated that he was not seeking injunctive relief, but dismissal of the charges. However, the motion was premised on the Board's decision and the decision in the sergeant's case clearly indicated that the Board did not intend its ruling to be retroactive.

Based on the fact that the Department has an overwhelming public interest to ensure that its uniform members of the Department who are charged with enforcing the law, and who carry firearms are not using illegal/controlled substances; the Department still has authority to maintain a drug screening program. Accordingly, the Respondent's motion to dismiss the Charges and Specifications was denied on April 10, 2007.

Subsequent to this decision denying the Respondent's motion to dismiss this case, another judge of this tribunal addressed the motion to preclude evidence in the Sergeant Jackson matter. After Jackson's motion for injunctive relief was denied by the Board, he sought to preclude evidence which resulted from a hair analysis drug screen.[11] The ruling noted that despite the contractual or labor law issues that may exist regarding the methodology of testing, no issue of illegality or unconstitutionality has been established to provide a basis to suppress the evidence. (*see* Decision on Motion to Preclude Evidence in Disciplinary Case No. 82251/06, DCT Martin G. Karopkin, August 30, 2007 enclosed herewith as "Attachment A.").

2. MOTION TO DISQUALIFY ANY EMPLOYEE OF PSYCHEMEDICS FROM TESTIFYING AS AN EXPERT

On or about July 3, 2007 the Respondent filed a notice of motion seeking to disqualify any Psychemedics Corporation employees and representatives from testifying as an expert at the Respondent's Departmental trial. The Notice of Motion and Affirmation in Support of the Motion as well as a Memorandum of Law in support of the motion to disqualify Psychemedics were filed.

The Respondent stated in sum and substance in its Affirmation that the employees and representatives of Psychemedics should be disqualified from testifying as experts because they were in privity with the Department based on its long-term contractual relationship with the Department. The Respondent also stated that Psychemedics has a pecuniary interest in the hearing because of the income it derives from the contractual

[11] The Board case involving Jackson is the same case cited by the Assistant Department Advocate in its response to this Respondent's Motion to Dismiss.

relationship with the Department and therefore Psychemedics should be denied from testifying as an expert at the Departmental trial.

In its memorandum of law in support of the motion to disqualify Psychemedics and its employees from testifying as experts, the Respondent stated that it would be fundamentally unfair to permit staff members or representatives of Psychemedics to testify as experts at the Department trial. The Respondent stated that it is well settled law that experts are required to testify where the testimony sought is not within the experience and observation of ordinary laymen. The Respondent contended that to allow Pyschemedics to be experts and testify about the Department's own performance of its own employees and its own work performance would be self-serving.

The Respondent suggested that it would not be the same probative value of having the opinion of an objective expert unrelated to Psychemedics testifying about the Department's procedures in drug testing. The Respondent further suggested that Psychemedics and its employees should testify not as experts but as witnesses to the methods and procedures utilized by the Department in drug testing. The Respondent stated that employees of Psychemedics have been expert witnesses on behalf of the Department since the introduction of hair follicle testing by the Department in 1994.

The Respondent further argued that the testimony of Psychemedic's employees is given more weight than independent experts because Pyschemedics performs its test under scrutiny. The Respondent stated that the fact that Pyschemedics is reviewing its own work is patently unfair. The Respondent further stated that it is unlikely that the employees of Psychemedics would point out errors or flaws in their own work or

procedures. The Respondent noted that Psychemedics is traded on the American Stock Exchange and yields a pecuniary benefit to shareholders in the form of dividends.

In conclusion the Respondent argued that the employees and the representatives of Psychemedics in privity with the Police Department based on this long-term contractual relationship should be disqualified from testifying as experts in the Respondent's disciplinary hearing. He further stated that Psychemedics has a pecuniary interest in the hearing because of the income it derives from the contractual relationship with the Department and for these reasons, Psychemedics should be disqualified as an expert.

On or about July 16, 2007, this Court received a "Response to Motion to Preclude" from the Department. The Department stated that in order to prove the Charges and Specifications, the Department intended to call two expert witnesses, Thomas Cairns from Pyschemedics and James Borland from Quest Diagnostics. Each witness would testify about the test performed on the Respondent's hair samples and would offer expert opinions as to what the test results mean. The Department stated that neither expert would vouch for their employer or laboratory. Each expert would also testify about the financial compensation, if any, received for their court appearance.

The Department argued that precluding the testimony of the expert witness because he works for the company that does business with the Department is contrary to common sense. The Department stated that arguably any paid expert would be precluded from testifying and this would include Department chemist and ballistic experts because they work for the Department; or in the case of the medical examiner, that examiner would be prevented from testifying in homicide cases because he or she is employed by

the same municipality that employs the prosecutor as well as the judge. Similarly, the Deputy Commissioner of Trials and his Assistant Deputy Commissioners would be precluded from presiding over Department trials because they are employed by the ultimate finder of fact, the Police Commissioner. The Department contended that since the Respondent's motion was based on speculation and not founded on common sense, it should be denied in all respects.

On or about July 31, 2007, this Court received the Respondent's Reply Affirmation in support of its motion to disqualify Pyschemedics which was dated July 30, 2007. The Respondent reiterated that the issue he was concerned with was whether the Department can call as an expert, Pyschemedics who is employed and contracted with the Department to conduct drug screening analysis from hair samples. The Respondent stated that Pyschemedics should be allowed to testify as a witness but should not be allowed to testify as an expert in their own behalf because of the privity of contract between the Department and Pyschemedics Corporation. The Respondent further contended that the method by which Pyschemedics washes hair to rid it of external contamination is considered a trade secret by Pyschemedics. The Respondent reiterated its request that Psychemedics and its employees and representatives should be disqualified from testifying as experts in the Department trial based on this long-term contractual relationship with the Department and its pecuniary interest in the hearing.

On or about July 31, 2007, this Court decided on the record the Respondent's motion to disqualify Pyschemedics from testifying as an expert in the Respondent's disciplinary hearing. The Respondent's motion to preclude Pyschemedics from testifying as an expert was denied. One reason the motion was denied was that virtually all experts

are paid. This Court found that the fact that an expert is paid does not justify a conclusion that the expert would subvert his or her testimony because he or she was paid by one side. It is for the opposing counsel to cross examine the expert and question his or her authority; or present additional expert testimony to counter the theories presented by that expert rather than to disqualify the expert from testifying *in toto*. The Department cited in its Response to the Motion to Preclude, the example of the medical examiner testifying in a homicide case. In that instance, the medical examiner is paid by the state or the city just like the prosecutor as well as the judge. This was a good example to show that the medical examiner could give expert testimony even though the medical examiner is paid by the same entity that pays the prosecutor as well as the judge.

Another reason to deny the motion to preclude Pyschemedics from testifying as an expert is that Pyschemedics' testimony would not be just that of any other witness. Pyschemedics would be coming in to testify and explain their washing procedures the test that they perform on the hair and how they are able to break down the drug components that may or may not be contained in a hair sample. This testimony in no shape form or fashion could be considered lay testimony. It must be noted that the Police Department is in the business of combating crime and in the practice of doing so; they hire experts to come in and to test the hair of their police officers. The Police Department has an interest in making sure that the police officers out on the street and stopping crime are not under the influence of alcohol, drugs or other substances that can affect their ability to fight crime. They must not be under the influence of substances which would prevent them from being able to utilize their firearms as they carry out their functions as police officers.

In addition, the Respondent cited several cases one in particular will be summarized by this Court. The Respondent cited Paul v. Rawlings Sporting Goods Company, 123 F.R.D. 271 (S.D. Ohio, 1988). In this case an expert was contracted by the defense to test helmet equipment for possible future litigation involving helmets used for baseball. At some point the contract between the defense and the expert fell through. Later that same expert was going to be retained by the plaintiff in a personal injury case who was injured playing baseball using the same helmet. The defendant, who initially wanted to use that expert in its own case, sought to disqualify the expert who would now be testifying for the plaintiff. The court stated that, "Yes I can as the court disqualify an expert to preserve public fairness and integrity in judicial subpoenas." But the court went on to state that it was not applying a bright line rule disqualifying an expert exclusively on the fact that a contractual relationship existed between the parties. This is key because the court is stating that simply because a contractual relationship exists does not mean that an expert will be excluded. That court went on to state that on the other hand, there may be situations where even though there is a formal contractual relationship, little will be accomplished by excluding the expert testimony. It would not impact the integrity of the trial nor would the interest of the party who seeks to use the expert be served by an outright disqualification of the expert.

Based on the reasons stated above, the Respondent's motion to disqualify any employee of Psychemedics from testifying as an expert was denied.

Specification Nos. 1 and 2

The Respondent stands charged with possessing and ingesting cocaine.

One question must be answered: Did the Department present substantial evidence sufficient to prove that the Respondent possessed and ingested cocaine? I find that the question must be answered in the affirmative. As a result, I find the Respondent Guilty as charged.

The Department Presented Substantial Evidence Which Proves that the Respondent Ingested Cocaine

With regard to the procurement of the Respondent's hair samples, Morris testified credibly that he, a registered nurse, followed proper procedures when he cleaned the examination table with alcohol prior to spreading the butcher block paper and before shaving the Respondent's arm hair. He testified that he used gloves prior to shaving the arm hair. He also stated that he used a new, one-time use razor that was in a plastic package to shave the Respondent's hair. Morris said that he followed proper procedure in placing the hair samples into sealed envelopes, storing the samples in delivery bags and arranging for sealed delivery to Psychemedics.

As to the testing itself, in the first Departmental trial in which hair testing evidence was introduced to prove the ingestion of controlled substances, Disciplinary Case No. 70729/96, the Hearing Officer found that radioimmunoassay confirmed by MS is a reliable method of detecting the presence of cocaine in hair.

It is also settled that due process does not require that the technician(s) who performed the scientific tests be called to testify; it is sufficient for the laboratory director, in this case Cairns, to confirm that Psychemedics followed proper laboratory procedures, that a proper chain of custody regarding the samples was maintained, and to testify regarding the analytical procedures utilized and the results obtained as delineated

in the laboratory litigation support package (DX 2). Gordon v. Brown, 84 N.Y.2d 574 (1994), See also People v. Rawlins, 10 N.Y.3d 136 (2008). These results clearly show that the Respondent's hair samples contained cocaine and Cairns' expert testimony sufficiently established that the combined RIA and MS results, with levels above the cutoff rate of five shows that the cocaine detected could only be the result of the Respondent having ingested cocaine.

The Respondent denied that he ingested cocaine and he offered alternative theories at trial and during his Official Department Interview as to why his hair samples may have tested positive for cocaine such as: 1) laboratories make mistakes; 2) the Psychemedics test result and the Quest test result are inconsistent with each other; 3) the Respondent took the antibiotic penicillin which closely resembles the antibiotic amoxicillin which allegedly can cause a false cocaine positive; 4) the Respondent could have inadvertently come in contact with cocaine through passive inhalation; 5) hair color, ethnicity and race may play a role in testing results: 6) The Department's expert Cairns had a stake in the outcome of the case; 7) The Respondent's expert Bidanset was wholly independent and his testimony should be given more weight than Cairns' testimony. I will address each of these claims separately.

With regard to the argument that laboratories make mistakes, there was no evidence presented at trial that the chain of custody between the hair samples collected of the Respondent, which was bagged sealed and initialed by the Respondent, was not the sample tested by Psychemedics. In fact, testimony presented by the Department was that the chain of custody was not broken. Cairns testified that the sample tested by Psychemedics under the Department identification No. 16-2352-06-XH was, in fact, the

Respondent because the same drug screening number used in the packaging of the Respondent's hair sample was initialed by the Respondent (See DX 2 the Laboratory Data Package, page 6). Clarke testified that he sent the Respondent's two samples to the laboratory and preserved the Respondent's third hair sample with the Sick Desk. It must be noted that two, separate hair samples collected from the Respondent were separately tested on different dates utilizing both the RIA test and the second test MS, and both samples came back positive for cocaine well above the cutoff level of 5ng. In addition, both hair samples tested positive for the metabolite BE, which can only be produced after cocaine was present in the bloodstream. Furthermore, Cairns testified that the samples are checked for tampering prior to conducting any laboratory tests and the seals were intact.

The argument that the Quest result and Psychemedics result were inconsistent, is without merit. First and foremost, no expert testimony was presented to establish the chain of custody with respect to the hair sample presented in the Quest test. In addition, as Cairns testified hair is not homogeneous such that different parts of the hair could yield different results. Moreover, the Quest sample was tested after the Psychemedics sample. Given the fact that the sample was tested at a different time and not subject to the same sensitive testing procedures as Psychemedics (i.e., hair washing and dissolving the hair), the difference in the test results could vary (See RX F, Laboratory Result).

Another theory presented by the Respondent is that he took the antibiotic penicillin and since his research showed that it is similar in structure to amoxicillin which could result in a false positive, this might account for his positive test for cocaine. This theory is without merit. The Respondent presented no evidence at trial, scientific,

empirical or otherwise, to support this claim. Further, Cairns stated in no uncertain terms that there are no scientific studies to support this view. Moreover, the Respondent acknowledged during his Official Department Interview that none of his research pointed to a false positive for cocaine by anyone who consumed penicillin.

The argument that the Respondent tested positive due to passive inhalation of cocaine is also without merit. The Respondent presented no evidence to support this claim. There was not a scintilla of empirical data presented at this trial to show that a positive cocaine test result could occur simply by being exposed to a person who smoked cocaine or being exposed to a room where cocaine had been utilized. The Respondent presented no data whatsoever to show the frequency to which he could have been exposed to cocaine in the air in his apartment or that the remnants of cocaine were, in fact, in the air in his apartment. Cairns testified credibly and unequivocally that the Respondent could not test above the cut-off level due to passive inhalation because passive inhalation is still a form of external contamination which does not pass through the bloodstream.

Following his Official Department Interview, the Respondent recalled a date when his girlfriend may have been consuming cocaine in a cigarette in his bathroom. Although the Respondent stated that the bathroom was “fogged up,” he testified that he did not smell smoke or any cigarette smell. How this isolated event could lead to the Respondent testing positive for cocaine well-above the cutoff level is beyond imagination. The Koren study referred to by Cairns came to the conclusion that an individual in a room with five thousand lines of cocaine would not test positive in a hair test conducted by Psychemedics. Moreover, the Psychemedics five-step washing process

that the hair sample was subjected to for a period of three and three quarter hours negated the possibility that the Respondent could have been externally exposed to cocaine resulting in a positive test result. Cairns testified that following the washing process, the Respondent's sample had zero contaminants on it externally.

Cairns compared the Psychemedics washing procedure to the testing done in the Kidwell study. In Kidwell, the hairs of children of cocaine dependent parents were tested. The children's hair was not subjected to Psychemedics washing procedure or the FDA approved testing that Psychemedics utilizes. Cairns stated that some of the children's hair that was tested was collected from the barbershop floor. There was no comparison between this study and the Respondent's case, particularly since there was no showing of the extent of any exposure to cocaine by the Respondent from someone else.

The Respondent opined that hair color, ethnicity and race may have played a role in the cocaine testing result. Cairns was also able to differentiate the Cone study where 20 subjects were tested and a conclusion was made that hair color, ethnicity and race had an impact on the test result. Cairns stated that Cone did not use the aggressive washing procedures of Psychemedics and that an additional study using 56,000 subjects found no correlation between hair color, ethnicity and race. Furthermore, Psychemedics removes hair color and separates melanin (color component of hair) from the hair sample that it tests.

The argument that the Department's expert, Cairns, had a stake in the outcome of the case was without merit. It was not demonstrated at trial that his testimony should not be given credit. He thoroughly outlined in a credible manner the testing policy used by Psychemedics; that they exercise quality assurance to test efficiently; and that

Psychemedics is licensed by both the federal government and the State of New York. Cairns is also a licensed laboratory director who the Court believes would not put his license he has held for many years on the line just to insure the outcome of this case. The Court believes the licensed laboratory director would insure his laboratory engages in quality control for two reasons. One, so that he can certify the laboratory tests, which he has done in this case, and maintain his good standing as well as the good standing of Psychemedics, which was established at trial, has tested over four million hair samples to date. And two, so that Psychemedics would continue to be licensed by New York State and the federal government.

The argument that Bidanset was an independent expert and therefore his testimony should be given more weight is also without merit. Although Bidanset, based on his education and years of experience, was declared an expert in the field of forensic toxicology, he has not held a license to practice forensic toxicology in New York State since 1979. Bidanset was not declared an expert in the field of hair testing, particularly in the area of workplace testing. Bidanset had not personally conducted any workplace hair testing and in fact, his area of expertise did not involve hair testing. Bidanset, who cited several hair tests, could not state with any degree of certainty what the positive cutoff levels were for any of the tests he cited; or what hair washing procedures were utilized, if any, in the tests he referred to. He also lacked familiarity with the aggressive washing procedure utilized by Psychemedics. He further stated that how the hair was washed would not make a difference to him in his findings. It is clear from the expert testimony of Cairns and the effects of aggressive hair washing prior to the advanced hair testing is a key component in workplace hair testing.

Another problem with Bidanset's expert testimony was that he failed to review the Quest laboratory reports in making his conclusions. He also never had any discussion with the Respondent regarding the nature of his relationship with his female companion and how that could have impacted any external contamination. This is important particularly since external contamination is one of the theories espoused by the Respondent regarding his positive test result for cocaine.

Moreover, when Bidanset was questioned as to whether he was familiar with the Koren, etal. study, "Hair Analysis of Cocaine: Differentiation Between Systemic Exposure and External Contamination," (DX 8) he was unfamiliar with the study. The study states in its introduction that it is differentiating between systemic exposure to cocaine and external contamination from being in contact with crack smoke. It states in no uncertain terms, "External contamination with crack smoke is washable, whereas systemic exposure is not.

The study goes on to test 20 individuals. Ten were admitted cocaine users, two were not but were suspected of being in an environment where cocaine was used. An additional ten persons denied cocaine use, denied external exposure to cocaine and whose urine tested negative for BE. A review of all the tables used in the study where exposure to cocaine was as little as 100 milligrams of crack smoke in an unventilated room mimicking an "occasional" exposure to one line of cocaine; versus 5000 lines of cocaine smoke in a room, in all the tables after the hair was washed using the ethanol washing cycles exceeding three hours, none of the hair samples of non-cocaine users tested positive for cocaine at or above the cutoff level and none tested positive for BE. (See DX 8). Only the samples of admitted cocaine users tested at or above the positive cocaine

levels. This supports Cairns position that the aggressive washing procedure eliminates external contamination of cocaine.

By contrast, Cairns based on his laboratory experience, extensive research and publications in the area of hair testing testified that a positive hair sample test is based on multiple use of the drug and not based on a single use. A positive at or above the cutoff level is not that of an accidental contamination. Thus, if the Respondent was exposed to cocaine on one occasion, he would not test above the Psychemedics cutoff level of 5ng. Cairns testified that the Respondent's test results of 123ng of cocaine/10mg of hair and 105 ng/10mg represents multiple ingestion of cocaine six to seven months prior to collection of both samples.

Bidanset testified that passive inhalation may change a cocaine test result to a positive; and that cocaine exposed to water would metabolize BE. The "may" contained in Bidanset's testimony showed the speculation with which he testified and the lack of scientific data to support his theories. Cairns, the expert in hair testing, unequivocally stated that hair testing requires multiple uses of cocaine to test at or above the cutoff level. He testified that passive inhalation would always test well below the cutoff level. He further opined that the cut off level of 5 nanograms per 10 milligrams of hair set by the Police Department is a stringent standard followed by federal guidelines. Even with Bidanset's discussion that placing cocaine in water releases BE, Cairns explains this supposition. Cairns testified that BE is highly water soluble and that it can easily be removed by washing. He said that external contamination to cocaine in the hair is washed away by Psychemedics aggressive washing procedure. He also said that this

holds true regardless of the concentration level of the drug or how long the subject was exposed to the drug.

Thus based on the lack of laboratory experience, hair testing experience and lack of familiarity with the testing procedures utilizing current studies in hair testing, I did not give much weight to the expert testimony of Bidanset. However, from a forensic toxicological standpoint, I did credit the testimony of Bidanset which stated that the testing procedures utilized by Psychemedics, namely RIA and MS represent the gold standard in testing procedures. In summary, based on the expert testimony of Cairns, I reject all of the Respondent's theories and suppositions as to how his hair could have been contaminated by cocaine without having ingested cocaine including the testimony of his expert witness.

The Respondent further contended that since the expert Cairns determined that the body hair sample has a different rate of growth than head hair growth, and that the body hair has a six to seven month look back period in time, since the Department only charged the Respondent for being in possession and ingesting cocaine for a three-month period that the Charges and Specifications are defective. This argument lacks merit. It is not in dispute that the Respondent was subjected to a random hair test by the Police Department on or about August 1, 2006. It is also not in dispute that his arm hair was tested since he had a bald head at the time of the test. A six-month look back from August 1, 2006 dates back to February 1, 2006. The Respondent has been a police officer since February 28, 1994 and thus a member of the service subject to the Department's "Zero Tolerance" drug policy for the entire period. Since the Charge and

Specification preferred by the Department Advocate's Office is for the period May 1, 2006-August 1, 2006, it is included within the period referred to by Cairns.

Moreover, this argument espoused by the Respondent is both inconsistent and contradictory. The Respondent's position is that he never ingested or possessed cocaine. Yet Cairns' testimony established credibly that the two positive test results for the Respondent indicate multiple ingestions of cocaine. He explained that the ingestion of cocaine was deliberate. He further explained that the high levels of cocaine represented regular cocaine use on a weekly basis. Sample one had a positive test result of 123ng cocaine/10mg hair which is 24 times the positive cut off rate of 5ng/10mg. The second sample had a rate of 105ng/10mg which is 21 times the positive cut off rate. There is an ample basis to find that the ingestion and possession of cocaine occurred within the charged period and certainly on the date that the hair samples were collected and later tested positive for controlled substances in the Respondent's body.

The Respondent also argued that his Quest Lab Report taken on his own accord for private testing did not show the presence of BE; that BE tested below the positive cutoff level; that despite the high level positive of the cocaine test, this is evidence that should be considered in a light favorable to the Respondent (RX F). This argument does not take into consideration the further breakdown of the Quest test result requested by the Department Advocate's Office. That follow-up breakdown of the test result (DX 3) requested a breakdown of the presence of any metabolites **at any level** (emphasis added). In that report, it was shown that the Respondent had the presence of BE in his sample. It must be noted positive cutoff levels apply to the drug cocaine, not to its metabolite or byproduct BE. The presence of BE in the Respondent's body, according to Cairns, can

only exist if cocaine was metabolized by the body, i.e. ingested into the Respondent's bloodstream by actual, physical consumption of cocaine. Such presence according to Cairns is not by external contamination.

The Respondent further argued that the fact that he disclosed at his Official Department Interview held on or about September 26, 2007 that he tested positive for cocaine in his own private test is evidence that he did not ingest cocaine because no one would disclose that information if he were a cocaine user. This argument lacks merit given the fact that the Official Department Interview requires the Respondent to answer questions posed to him in a truthful manner. If he were asked to tell the investigator what steps he took to disprove the positive test result, he would be required to answer that question.

Despite the fact that no testimony was elicited whatsoever regarding whether skin to skin contact could cause positive cocaine result, Bidanset referenced this notion in his testimony. The Respondent also intimated that his girlfriend Bruce was a drug user and she stated that she smoked cocaine, yet there was no testimony elicited from her whether she had close skin contact with the Respondent. It must also be noted that a review of the tape from the Respondent's Official Department Interview (DX 13) never referred to the Respondent's girlfriend by name.[12] Nevertheless, this theory of external contamination by skin contact with an avid cocaine user was disputed by Cairns who testified that Psychemedics aggressive washing procedure removes the possibility of external

[12] There was reference during questioning of the Respondent's girlfriend Shelly Bruce whether she knew of a person named Iris who may have been another girlfriend of the Respondent. A review of the tape and transcript of the Respondent's Official Department Interview determined the following: There was no reference by the Respondent in the tape recording of his interview to a girlfriend named Iris. There was reference to Iris in a transcription of the tape recording, but a close review of the actual tape recording, the best evidence in this instance, revealed that the transcription of the name "Iris" was in error.

contamination of cocaine testing at or above the cut off level. In addition, Cairns stated that sweat does not cause drugs to bind to hair. He also testified that in all of his research study, there is no scientific evidence whatsoever that even frequent skin-to-skin contact could result in a non-user testing positive for cocaine; or in the Respondent's case, the high level of cocaine and the metabolites found in the Respondent's hair well above the cutoff level in the two hair samples obtained from the Respondent.

Accordingly, I find the Respondent Guilty of Specification Nos. 1 and 2.[13]

Specification No. 3

The Respondent stands charged herein with failing and neglecting a lawful order to appear at the Department Advocate's Office on September 13, 2007. Francis testified that she contacted the Respondent on August 17, 2007 and informed him of the September 13, 2007 court date notification. She stated that the Respondent informed her that he was aware of the date, but it had been canceled. Francis stated that she did not tell the Respondent that he did not have to appear. Francis's supervisor Crowley testified that he received a fax transmission of the notification for the Respondent to report to court on September 13, 2007. He gave the transmission to Francis and instructed her to notify the Respondent of the court date. Crowley testified that he heard Francis make the notification to the Respondent. Even though Francis advised him that the Respondent said the notification was canceled or postponed, Crowley stated that he never received

[13] The Respondent in his Official Department Interview and trial testimony referred to tests he had done which were not turned over to opposing counsel at trial. However, the Respondent stated that his own investigation found that the vitamins/ proteins he took could not cause a false cocaine positive. Furthermore, he had no ailments which could cause a false positive. In addition, he only mentioned in passing that his ex-girlfriend's husband threatened to take his job and that Darryl and Bruce had access to his apartment. The court did not consider these undeveloped statements in its Findings and Analysis.

such a transmission in his office. He further stated that he checked with the other police officers who work in his unit and none of them acknowledged such a cancellation.

The Respondent testified that he received the notification from Francis. He also stated that he never received a cancellation of that notification from a member of the Department and he did not appear on the court date. The Respondent stated that a week before the court date someone told him his appearance was canceled, but he had no documentation of exactly when this took place and who told him this information. Based on the information that the Respondent received a notification to appear which was not formally canceled, I find no justification for his failure to appear.

Accordingly, based on the above, I find the Respondent Guilty of Specification No. 3.

PENALTY

In order to determine an appropriate penalty, the Respondent's service record was examined. See Matter of Pell v. Board of Education, 34 N.Y.2d 222 (1974). The Respondent was appointed to the Police Department on February 28, 1994. Information from his personnel record that was considered in making this penalty recommendation is contained in the attached confidential memorandum. The Respondent has been found Guilty of failing a personal directive to appear at the Department Advocate's Office. He is also found Guilty of wrongfully ingesting and possessing cocaine. This is based on the testimony of Morris and Clarke providing the chain of custody with respect to the collection of the Respondent's hair sample and forwarding for testing; and the expert testimony of Cairns which concluded that the two positive hair tests (levels of 123ng/10 mg and 105ng/10mg) using MS with the corresponding positives for the metabolite BE

both well above the cutoff level of 5ng came from the Respondent deliberately ingesting cocaine on multiple occasions.

Based on a preponderance of the credible evidence presented at trial, it was established that the Respondent has failed a personal directive to appear and also violated the Police Department's absolute prohibition regarding using illegal drugs, and, as a result, I recommend that he be DISMISSED from his employment with the New York City Police Department.

Respectfully submitted,

Claudia Daniels-DePeyster
Assistant Deputy Commissioner - Trials

POLICE DEPARTMENT
CITY OF NEW YORK

From: Assistant Deputy Commissioner – Trials

To: Police Commissioner

Subject: CONFIDENTIAL MEMORANDUM
POLICE OFFICER BRIAN ALEXANDER
TAX REGISTRY NO. 905673
DISCIPLINARY CASE NO. 82184/06

The Respondent was rated "Below Competent," "Competent" and "Above Competent," respectively on his last three annual performance evaluations. To date, the Respondent has no Letters of Commendation and has not been awarded any Medals in his career.

[redacted]

In Disciplinary Case No. 74954/99, the Respondent was charged with addressing detectives in a discourteous and disrespectful manner, interfering with an investigation, and failing to be in possession of his Department identification card while carrying his gun. The Respondent was found Guilty after trial and received a penalty of the forfeiture of 11 days time already served on suspension.

For your consideration.

Claudia Daniels-DePeyster
Assistant Deputy Commissioner – Trials